



Office of the Attorney General
State of Texas

October 23, 1996

DAN MORALES
ATTORNEY GENERAL

Ms. Susan M. Cory
General Counsel
Texas Worker's Compensation Commission
4000 South IH-35
Austin, Texas 78704

OR96-1914

Dear Ms. Cory:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101363.

The Texas Workers' Compensation Commission (the "commission") received a request for all records or complaints of sexual harassment between 1992 and 1996, including any pending or settled litigation. You claim that the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. You have submitted a representative sample of the documents at issue.¹

You assert that several of the documents involve investigations in which the commission now anticipates litigation. You claim that these documents are protected by section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you have demonstrated that certain employees have filed a complaint with the Equal Employment Opportunity Commission. We conclude, therefore, that the commission has shown that litigation is reasonably anticipated for a portion of the documents. Open Records Decision No. 336 (1982). After reviewing the submitted materials, we also conclude that these records relate to the anticipated litigation. The commission may, therefore, withhold those documents which we have marked.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We note, however, that some of the information may be confidential as outlined below and may not be released even after litigation has concluded.

You next assert that much of the requested information is confidential by law. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. You argue that the requested investigation files are confidential pursuant to section 402.092 of the Texas Labor Code. Section 402.092 provides:

(a) Information maintained in the investigation files of the commission is confidential and may not be disclosed except:

- (1) in a criminal proceeding;
- (2) in a hearing conducted by the commission;
- (3) on a judicial determination of good cause; or
- (4) to a governmental agency, political subdivision, or regulatory body if the disclosure is necessary or proper for the enforcement of the laws of this or another state or of the United States.

-
- (d) For purposes of this section, "investigation file" means any information compiled or maintained by the commission with respect to a commission investigation authorized by law.

This statute makes confidential the commission's investigation files concerning compliance with Texas workers' compensation laws. However, the commission's own investigations of internal personnel matters is not an investigation into worker's compensation laws. See Open Records Letter Nos. 96-1125 (1996), 96-805 (1996), 95-1508 (1995). Thus, section 402.092 does not make these internal records confidential.

You also contend that much of the remaining requested information is protected by a right of privacy. Section 552.101 encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Based on *Ellen*, the commission must withhold the investigation files except for the documents labeled "Memorandum" which contain two sections titled "Investigation Summary" and "Summary of Findings." These documents provide an adequate summary of the investigation into the alleged sexual harassment. These documents, however, would serve to identify the victim and the individual witnesses of the alleged sexual harassment. You have marked this information in yellow. Since the identity of the victim and the witnesses to the alleged sexual harassment is protected by the common-law privacy doctrine as applied in *Ellen* and *Industrial Foundation*, the names of these individuals must be withheld. However, we find that the public interest in the statement and the identity of the alleged harasser outweighs any privacy interest he may have in that information. Therefore, the commission may not withhold this information under section 552.101.²

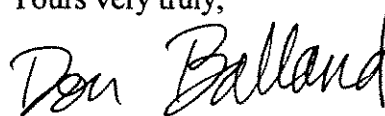
²Because we are able to make a determination under sections 552.101 and 552.103, we do not address your arguments under section 552.107 at this time.

You additionally argue that portions of information within the investigation "summaries" is excepted by section 552.108. You have marked this information in green. You refer us to *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995), to support your contention. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108; see *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). We have considered your section 552.108 claim in light of the court's opinion in *A & T*, and we do not believe that the information at issue falls within the scope of section 552.108. The commission may not withhold this information under section 552.108.

You finally contend that certain information within the "summaries" is excepted from disclosure by section 552.111. You have marked this information in blue. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In this instance, the marked portions of the documents merely involve personnel matters. The commission may not withhold this information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 101363

Enclosures: Marked documents

cc: Mr. Roby M. Chavez
Reporter, KTVT-TV
5233 Bridge Street, P.O. Box 2495
Fort Worth, Texas 76113
(w/o enclosures)